

An appeal

- by -

Healthy Obsession Services Ltd. carrying on business as Jugo Juice
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE No.: 2015A/155

DATE OF DECISION: January 22, 2016

DECISION

SUBMISSIONS

Utman Ali Jalifi and Michael Shomali	on behalf of Healthy Obsession Services Ltd. carrying on business as Jugo Juice
Kara L. Crawford	on behalf of the Director of Employment Standards

OVERVIEW

1. On October 16, 2015, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) according to section 79 of the *Employment Standards Act* (the “Act”), requiring Healthy Obsession Services Ltd. carrying on business as Jugo Juice (the “Appellant”) to pay to the complainant outstanding wages and interest in the aggregate amount of \$383.53.
2. Perhaps of greater concern to the Appellant is the Director’s further order requiring the payment of administrative penalties in the amount of \$6,000.00, as a consequence of the Appellant’s contraventions of sections 17, 18 and 33 of the *Act*, and section 46 of the *Employment Standards Regulation*.
3. The wage calculation on the first page of the Determination contains what appears to be a typographical error; for the purposes of these reasons, I have referred to the wage calculation summary appended at the last page of the Determination, which sets out a mathematically correct calculation.
4. The Appellant challenges the Determination and says that:
 - (a) the Director has failed to observe the principles of natural justice in making the Determination; and
 - (b) evidence has become available that was not available at the time the Determination was made,both permitted grounds of appeal, respectively under sections 112(1)(b) and 112(1)(c) of the *Act*.
5. At this point, I am charged with considering whether or not the matter should be dismissed, on a summary basis, pursuant to section 114(1) of the *Act*.
6. Having considered:
 - (a) the Determination issued by the Director on October 16, 2015;
 - (b) submissions on behalf of the Appellant, received on November 23, 2015, November 26, 2015, and December 8, 2015; and
 - (c) the Director’s Record (the “Record”), received on November 27, 2015,

I am forced to conclude that, for the following reasons, neither ground advanced by the Appellant has any reasonable prospect of success and, as such, this appeal should be dismissed according to section 114(1)(f) of the *Act*.

THE FACTS AND ANALYSIS

7. On August 17, 2015, the Complainant submitted a complaint to the Employment Standards Branch, seeking \$650.00 in unpaid wages.
8. On September 16, 2015, a delegate of the Director telephoned the Appellant's place of business, and spoke to Mazda Jalifi ("Ms. Jalifi"). At the time, Ms. Jalifi was a director of the Appellant, and, according to Utman Ali Jalifi ("Mr. Jalifi"), managed the Appellant's business. Although the Record does not contain a transcript or notes of that call, the conversation was followed by an electronic mail message, sent by the Director's delegate on the same day, enclosing a Demand for Records, and a Notice of Hearing with respect to the complaint, scheduled for October 15, 2015.
9. Paper copies of the Demand for Records and the Notice of Hearing were also sent to the registered and records office of the Appellant, by registered mail, on September 17, 2015. Confirmation of delivery on September 18, 2015, is included in the Record.
10. On October 1, 2015, the Director's delegate forwarded, to the Appellant, copies of documents submitted by the complainant, although I cannot ascertain from the Record how those materials were delivered.
11. Hearing of the complaint commenced at 9:00 A.M. on October 15, 2015. A representative of the Appellant did not appear. At 9:08 A.M. on October 15, 2015, another delegate of the Director sent a message to the Appellant by electronic mail, confirming that the hearing was underway. The delegate sought to confirm whether or not a representative of the Appellant was *en route* to the hearing venue. No response to that message is included in the Record, and it appears as though the hearing continued in absence of anyone attending on behalf the Appellant.
12. The Determination was issued on October 16, 2015, and a copy delivered to the Appellant by registered mail.
13. Within this framework, I consider the two grounds of appeal now argued by Mr. Jalifi and Michael Shomali.

Section 112(1)(c) - Fresh Evidence

14. In *Davies et. al.* BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four-part test before exercising any discretion to accept and consider fresh evidence:
 - (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
15. If any one part of the four-part test is not satisfied, an appeal under section 112(1)(c) of the *Act* must fail.

16. In this case, the Appellant seeks to have considered its version of the complainant's work schedule, similar but not identical to the work schedule submitted by the complainant and included at pages 25 to 27 of the Record.
17. These documents appear to predate the complaint and, as such could easily have been submitted to the Director in response to the Demand for Records or during the hearing of the complaint. The Appellant offers no plausible reason for the delay in producing these materials, and in the face of proof that the Appellant was served by registered mail with copies of both the Demand for Records and the Notice of Hearing, I find that the first part of the *Davies* test has not been satisfied.
18. Accordingly, the appeal under section 112(1)(c) of the *Act* must fail.

Section 112(1)(b) – Failure to Observe the Principles of Natural Justice

19. More difficult is the appeal under section 112(1)(b) of the *Act*. I say this, because the Director has opted not to issue reasons for the Determination.
20. Natural justice requires the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).
21. Within the framework of a hearing or an investigation under the *Act*, fairness means that all parties involved have the right to notice, the right to be heard, the right to a coherent procedure, and the right to a reasoned decision (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).
22. It is difficult to determine whether or not the Determination is reasoned, when reasons have not been issued.
23. The repeal of section 81(1)(a) of the *Act* in 2002 relieved the Director of the obligation to deliver reasons, absent written request. In this case, the Appellant failed to make demand in the manner required under section 81(1.2) of the *Act* and, accordingly, reasons were refused.
24. In point of fact, the Director's general practice is to deviate from the statutory provisions and to issue reasons concurrently with a determination. Indeed, "... while a compliant subsection 81(1.3) request creates a mandatory obligation to issue written reasons for decision, a delegate can issue written reasons, if that is thought appropriate, even though the request does not comply... [t]here is nothing in the *Act* prohibiting the Director from issuing reasons after the '7-day request period' has expired." (*24/7 Excavating Ltd.*, BC EST # RD116/15, at paragraph 8).
25. One cannot fault the Director for insisting on strict compliance with the statute, particularly when considering this Appellant's own inattentiveness. But, to the extent that the overriding purpose of our employment standards legislation is, in part, "to provide fair and efficient procedures for resolving disputes..." (section 2(d) of the *Act*), the provision of reasons irrespective of the Appellant's carelessness seems to me to be not only the prudent thing to do, but the most efficient, particularly when the Tribunal is asked to consider an appeal under section 114 of the *Act*. The delivery of reasons ought to be encouraged, in all cases.
26. In this instance, after considerable deliberation and notwithstanding the concern I express with respect to the lack of reasons, I have determined that I can and should proceed under section 114 as it relates to the appeal under section 112(1)(b). I do so on the basis that the facts in this matter are very straightforward, and on the

basis that the Appellant ultimately neglected, without reasonable explanation, to request reasons in a timely manner.

27. On review of the Record, I accept that:

- (a) the Appellant had ample notice of the complaint and the resulting hearing, both in the manner required under section 122 of the *Act* and otherwise;
- (b) the Appellant had the right to be heard at the complaint hearing;
- (c) the procedure for submitting documents, giving evidence, and contesting the complainant's evidence was both clear and clearly laid out for the Appellant.

28. It is also clear, based on the Record, that:

- (a) Between July 20 and August 9, the complainant worked eighty and one half hours, in total. Four of these hours are recorded with respect to August 4, 2015, and shown in hand written notes included at pages 28 and 29 of the Record; the balance is shown on the weekly schedule included at pages 25, 26, and 27. At the minimum wage rate, the total payable would be \$825.13.
- (b) Vacation pay on \$825.13, calculated according to section 58 of the *Act*, is \$33.00.
- (c) On August 31, 2015, the complainant was paid gross wages in the amount of \$476.63, none of which is vacation pay.
- (d) The balance payable, before interest, is \$381.50.
- (e) Based on the work schedule included in the Record, there appears to have been a split shift on each of July 31, 2015, and August 1, 2015. On each day, the shift was organized as follows – 7:30 a.m. to 11:00 p.m., and then 4:00 p.m. to 8:00 p.m.

29. With respect to the administrative penalties, I agree that:

- (a) The complainant was not paid for the period commencing July 20, 2015, and ending August 9, 2015, until August 31, 2015. This exceeds the timelines for payment of wages in sections 17 and 18 of the *Act*.
- (b) Compliance with section 33 of the *Act* required completion of the split shifts no later than 7:30 p.m.
- (c) The Appellant failed to produce records in response to the Demand for Records delivered to on September 18, 2015. As such, the Appellant contravened section 46 of the *Employment Standards Regulation*.

30. Accordingly, and although reasons are not included with the Determination, I accept that the Determination is reasoned.

31. The Director has not failed to observe the principles of natural justice.

ORDER

32. This appeal is dismissed pursuant to section 114(1)(f) of the *Act*. Pursuant to section 115 of the *Act*, I Order the Determination, issued on October 16, 2015, be confirmed together with any further interest that has accrued under section 88 of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal